RIGHTS STUFF

A Publication of The City of Bloomington Human Rights Commission

City of Bloomington

February 2012

Volume 150

Ministerial Exception to Equal Employment Laws

In the November 2011 issue of Rights Stuff, we discussed the case of Hosanna-Tabor v. Equal Employment Opportunity Commission. The U.S. Supreme Court recently issued its decision.

The facts of the case are fairly simple: Cheryl Perich taught at Hosanna-Tabor, a Lutheran School. She was initially a lay teacher with an annual teaching contract. Later she became a "called" teacher after having received religious training and having been approved by the church. She mainly taught secular classes, but also taught religious classes and led prayers from time to time. When called teachers were not available to do religious-type activities, lay teachers filled in for them.

Perich became sick and took off more than a semester for disability leave. When she tried to return, in February of 2005, the school told her they had contracted a lay teacher to teach her class for the rest of the year. They tried to work out an arrangement where she would resign in exchange for the school paying for her health insurance. She said she had spoken to an attorney to learn her rights. The school then fired her for insubordination and disruptive behavior when she tried to return to work and for threatening to take legal action in violation of church beliefs. She sued, alleging a violation of the Americans with Disabilities Act.

The question for the Court was whether Perich was a "ministerial employee." If she was, the Court said, she was not covered by discrimination laws. Courts do not want to enmesh themselves in issues of religious doctrine, such as whether a called teacher had violated a church belief. In an unanimous decision issued in January, 2012, the Court said that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such actions interfere with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."

The Court said that the ministerial exception would not apply to all employees of faith-based groups, but it applied to Perich. Hosanna-Tabor held her out as a minister. It gave her a "diploma of vocation," awarding her the title "Minister of Religion, Commissioned."

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Ohio Commission Rules Against "Whites Only" Swimming Pool

An African American teen was visiting her parents at their apartment complex in Ohio. The landlord, Jamie Hein, saw the teen and put up a sign saying "Public Swimming Pool, Whites Only." The parents saw the sign, filed a race discrimination complaint with the state's civil rights commission and moved out. They wanted to avoid subjecting their family to further humiliating treatment. The Ohio Civil Rights Commission, not surprisingly, found for the family.

Ms. Hein disagrees with the decision. At first she said that she posted the sign only to "prevent the chemicals in the girl's hair products from rendering the pool cloudy." She did not explain why she could not merely adjust the chemicals she uses in the pool. Later she said that the sign was just an antique, that it been there for years, but that it was only visible when the gate was closed. From the photograph taken by the AP, that does not seem to be true.

The OCRC said in its preliminary finding that posting the sign "restricts the social interaction between Caucasians and African Americans and reinforces the discriminatory actions aimed at oppressing people of color." If the OCRC upholds its original finding, Ms. Hein may have to remove the sign and pay damages to the family.

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ADA Does Not Require Employers to Accommodate Employees Who Associate with Someone with a Disability

Eugene Stansberry managed Air Wisconsin's operations at Kalamazoo Airport from 1998 until July 26, 2007. He was well-liked and received strong performance reviews for much of that time.

In the mid-1990s, his wife developed a very rare and debilitating autoimmune disorder called polyarteritis nodosa. This condition causes tumors, lesions, strokes, severe pain, dizziness, numbness, weakness and vision problems. Both Stansberry and his wife had health insurance through Air Wisconsin. Initially, the plan covered Remicade infusions for Mrs. Stansberry. This treatment cost about $4,000 every six weeks and was effective.

In March of 2007, her condition worsened, and her doctors recommended that she resume the Remicade treatment. But because Remicade was not technically approved for treating her disorder, the health plan administrator told Mr. Stansberry that it would not cover this treatment. He appealed. The company agreed to cover the treatment through July of 2007.

At about the same time, Air Wisconsin increased its operations in Kalamazoo, growing from 11 to 25 employees. Stansberry did not train these 14 new employees, but was responsible for making sure they did their jobs. Between February and May of 2007, six of the new employees received a total of nine security violation letters from the Kalamazoo airport director. Stansberry did not notify Air Wisconsin's corporation headquarters about these violations.

In June of 2007, the federal Transportation Security Administration sent a letter of investigation to Air Wisconsin's headquarters. When Martin Mulder, Stansberry's supervisor, received this letter, he was upset that Stansberry had not informed him of the security violations. He asked Stansberry why he had not told headquarters about the violations, and Stansberry said he did not know it was necessary. Air Wisconsin said it had always been their policy that airport managers notify headquarters about security violations. At Stansberry's suggestion, they sent a memo to all of the managers reminding them of the policy.

Even before the security issue arose, Mulder and Stansberry had conflicts. Stansberry sent Mulder several e-mails saying he was not happy with Mulder's management style and was thinking of quitting. One of his e-mails said, "I just can't do this job knowing that I am failing at my job. I have too much pride."

Mulder met with Stansberry on July 26. By the end of the meeting, Mulder had fired Stansberry. Mulder said Stansberry was fired for poor performance based on his failure to stay within budget, failure to report security violations and improper supervision of employees. Mulder said he had not decided before the meeting if he would fire Stansberry or not. He took a letter to the meeting that said Stansberry was fired; the only grounds for termination listed in the letter, which Mulder gave Stansberry, was the security violations.

Stansberry sued Air Wisconsin, alleging that he had been fired for associating with a person with a disability. He lost.

The Americans with Disabilities Act prohibits covered employers from discriminating against an employee because he associates with a person with a disability. However, the law does not require that employers provide reasonable accommodations to an employee because of that association. If the employee has a disability and needs a reasonable accommodation, the employer has to provide that, but it does not have to accommodate the relative's disability.

The courts that have looked at this associational issue have found three theories of discrimination:

--expense, when the relative's disability is costing the employer a lot of money because of medical bills;

--disability by association, when the employer is concerned that the employee may contract the relative's disability; and

--distraction, when the employer has unfounded concerns that the employee will be distracted from his job duties because of the relative's medical issues.

Stansberry relied on the distraction theory. But he didn't have any evidence to show that Air Wisconsin's alleged concerns that he would be distracted from his job were unfounded. Air Wisconsin had a great deal of evidence showing that Stansberry was not performing his job to its satisfaction. Poor performance is a legitimate, nondiscriminatory reason to terminate someone, whether that poor performance stems in whole or in part because the employee is concerned about his wife's health. Air Wisconsin was not required to provide any accommodations to Stansberry, who did not have a disability himself.

The Court said, "While Stansberry's situation is very unfortunate, he has not offered anything to show that his wife's disability was in any way connected to Air Wisconsin's decision to terminate him. The only connection is that it possibly caused his performance to slip. Therefore, Air Wisconsin's decision to terminate Stansberry does not run afoul of the law."

The case is Stansberry v. Air Wisconsin Airlines Corporation, 2011 WL 2621901 (6th Cir. 2011). If you have questions about your rights and responsibilities under the ADA, please contact the BHRC.

Treatment of Prior Misconduct That is a Product of a Disability

Mary Wolski began working for the City of Erie, Pennsylvania as a firefighter in 1997. She had no problems doing her job until 2005, when her mother became ill. She took approved leave to care for her mother until her mother died on December 24, 2005. The death of her mother hit her hard, and she took off much of 2006 as well, with the approval of her supervisor. While she was on leave, the city kept in touch with her to make sure she was receiving proper mental health treatment.

Wolski agreed to return to work on a part-time basis, performing two half-days of light duty a week, beginning December 12, 2006. But she did not report to work that day. The fire chief tried to call her, but no one answered. So he sent his deputy to go check on her at home. When the deputy, Vance Duncan, got to Wolski's home, she told him that she had been very depressed and was having suicidal thoughts. She said she had just started a new prescription. She said she didn't want to talk to anyone, and that is why she had not reported to work as scheduled or answered the telephone. Her approved leave was extended.

On December 27, Wolski's immediate supervisor called her to see how she was doing in light of the recent first anniversary of her mother's death. She told him that she was "freaking out, but I have my family with me, so I'll be okay."

She apparently was not doing okay. The next day, she went to her father's home – her father was in the hospital – and tried to commit suicide. She disconnected the smoke alarms and disassembled the furnace flue pipe to produce carbon monoxide in the house. She then took an overdose of her father's medications. When she survived all of that, she ignited some clothing in a bathtub to create a smoky fire that would lead to her death by carbon monoxide poisoning. After lighting the fire, she cut her neck several times with a buck knife. Family members discovered her and called 911. By then the fire was out, but firefighters sprayed down some areas of the house to make sure there were no hot spots. Wolski was taken to the hospital and received emergency treatment for her overdose and her smoke inhalation.

Law enforcement considered charging her with arson, but given that her father did not file a complaint and in light of her mental health issues, they declined to do so.

In April of 2007, the fire department fired Wolski, saying that since she had started a fire in her residence, she was "presumptively unsuited to be a firefighter." In June of 2007, she provided a letter from her treating psychiatrist, saying she was medically cleared to return to work. Another letter from the same psychiatrist, dated August 6, 2007, said that she denied any current suicidal or homicidal thoughts and that her insight and judgment were felt to be "fair to good."

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Is It Illegal in Texas for Two Men to Kiss in Public?

In June of 2009, four men went to Chico's Tacos restaurant in El Paso, Texas. They placed their orders and while waiting at the counter for their food, two of the men kissed briefly. When they took their seats, the same two men again kissed briefly.

A security guard approached their table and said, "If you continue with your clowning around, we will throw you out of here." The diners said they were puzzled by his threat. In reply, he called them "pigs" and again threatened to evict them.

The diners believed that the security guard had violated their right to be free from discrimination in public accommodations on the basis of their sexual orientation. They asked the manager to intervene, but he declined to do so. So they called the police.

Forty-five minutes later, a police officer arrived. The officer told the diners that it was "against the law for two men to kiss in public" and that he could arrest them for "that kind of behavior." The diners asked the officer for his name, but he declined to provide it, saying they didn't need it because there would be no police report. They said they wanted a police report to be filed, but the officer said he could file a police report only if he first arrested them for homosexual conduct. He told them, "You should know the law before you call the police." He ordered them to leave, saying "You are lucky that you are not going to be ticketed for homosexual activity."

So the diners sued, saying the officer had denied their right to equal treatment under the state constitution and caused them mental anguish by publicly humiliating them, threatening them with arrest under a Texas state law that had been declared unconstitutional, failing to enforce the City's anti-discrimination ordinance and refusing to file a police report. (Texas law prohibited public displays of homosexuality, but this law was declared unconstitutional by the Supreme Court in Lawrence v. Texas, 539 U.S. 558 (2003).) They also claimed that the police chief had violated their rights by not training his officers on the current state of Texas and El Paso law.

At trial, the City won. The Trial Court ruled that the diners lacked standing because none of them suffered a concrete, particularized injury. The Court of Appeals disagreed.

The Court of Appeals said that the injury the diners alleged – intentional public humiliation, being treated like criminals and being threatened with arrest under an unconstitutional state law – was a sufficient injury to bring a lawsuit. They didn't have to be arrested to have the right to sue.

The case is De Leon v. City of El Paso, 2011 WL 5142689 (Texas Ct. App. 2011).

Ministerial exception, *cont.*

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Before she earned that title, she completed eight college-level courses on religious-based topics. She took advantage of a special housing allowance that was available only for employees who earned their pay "in the exercise of the ministry."

The EEOC and Perich argued that she spent only 45 minutes a day on religious duties, and that the ministerial exception should apply only to those "employees who perform exclusively religious functions." The Supreme Court said it was unsure whether any such employees exist. Even the heads of religious institutions are often responsible for bookkeeping and facility management, not "exclusively religious functions."

The case is Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 2012 WL 75047 (U.S. 2012).

Prior misconduct, *cont.*

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She filed a grievance about her termination, unsuccessfully. The fire chief said at the hearing that his primary concern was the safety of his firefighters, and given that Wolski had started a fire, he was not willing to put her back on the job. He said that if he had received the letters from her psychiatrist before he made his decision to terminate her, he might have engaged in a more thorough evaluation process. He said he still had concerns about her mental health, considering the fact she had told former co-workers that she was going to have a birthday party for her deceased mother. He noted that firefighters have to be alert, able to go from a dead sleep to complete alertness in a matter of seconds, and he had concerns that her various prescriptions could prevent her from being able to do that.

Wolski then sued under the Americans with Disabilities Act. She argued that "a jury could find that [she] was terminated for reasons other than having burned some clothes in a bathtub to create smoke, namely that the City had an unexamined and generalized fear that an employee who attempts suicide automatically poses a direct threat to others." She said the City had not undergone an "individualized assessment" to see if she was in fact a direct threat to others.

The Court said that case law establishes that "the ADA does not preclude employers from disciplining or even discharging their employees for past misconduct, even where the misconduct is a product of a disability." However, in this case, the Court said it was up to a jury to decide whether the City fired Wolski because of her past misconduct or because of its generalized concerns relative to her perceived psychiatric disability. The Court denied the City's motion for

TSA Workers Not Protected by Rehabilitation Act

Martin Field began working for the Transportation Security Administration in 2004 as an airport security screener. Screeners are required to be able to walk up to two miles a shift, stand for long periods of time and lift baggage weighing up to 70 pounds.

Field had diabetes that caused, among other things, recurring diabetic ulcers on the bottom of his feet. He had to wear an air cast and stay off his feet for long periods of time. When his leg became infected in 2006, he took off six weeks of work under the Family and Medical Leave Act. His doctor said he could return to work, as long as he could sit during his shift as needed. He reported to work but was not allowed to return to duty because of his medical restrictions. For the next two months, he called in sick every day so he would not be terminated for not showing up to work. He was then fired. Field sued, alleging the TSA had violated the Rehabilitation Act (essentially the Americans with Disabilities Act for government employees). He, or rather his wife after he died, lost the case.

As the Court noted, Congress created the TSA immediately after September 11, 2001. The law creating the TSA says that "*notwithstanding any other provision of law,* the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service." (Emphasis provided.) Congress told the TSA that its screeners had to be fit for duty and provided detailed physical requirements that the screeners had to be able to meet annually.

Because the law says "notwithstanding any other provision of the law," the Court said that TSA screeners are not protected by the Rehabilitation Act. TSA was permitted to say that employees had the right to request reasonable accommodations, but if they could not meet the statutory requirements for their jobs, they are not eligible for the requested accommodation. The Court's reading of the law – like every other Court that has faced this question – said that Congress had determined that the TSA should not be subjected to EEOC investigations and second-guessing of its employment decisions by agencies and courts.

The case is Field v. Napolitano, 2011 WL 5429573 (1st Cir. 2011). If you have questions about employment discrimination, please contact the BHRC.